No. 02-140

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IAIN FRASER, *ET AL.*,

Petitioners,

—v.—

MAJOR LEAGUE SOCCER, L.L.C., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1.

Was it error for the court of appeals to conclude, based on the particular facts and circumstances of this case, that, without proof of the alleged relevant market, it was not possible to evaluate Petitioners' claim that Major League Soccer and the United States Soccer Federation had engaged in a "conspiracy to monopolize" under Section 2 of the Sherman Act?

2.

Was it error for the court of appeals to conclude, based on the particular facts and circumstances of this case, that Petitioners were bound by a jury verdict rejecting, after four years of litigation and a three-month trial, the relevant market definition most favorable to their case and the only relevant market definition they had ever proposed?

LIST OF PARTIES

The following named respondents, on whose behalf this opposition is being filed, are referred to collectively herein as the "MLS Respondents:"

Major League Soccer, L.L.C.
Anschutz Chicago Soccer, Inc.
Anschutz Soccer, Inc.
Empire Soccer Club, L.P.
Kraft Soccer, L.P.
Los Angeles Soccer Partners, L.P.
South Florida Soccer, L.L.C.
Team Columbus Soccer, L.L.C.
Team Kansas City Soccer, L.L.C.
Washington Soccer, L.P.

CORPORATE DISCLOSURE STATEMENT

The MLS Respondents jointly make the following disclosures in accordance with Supreme Court Rule 29.6:

> Respondent Major League Soccer, L.L.C. has no parent corporation and none of its investors are publicly held corporations. None of the other MLS Respondents have publicly held parent corporations or stockholders. The Interpublic Group of Companies, Inc. (a publicly held corporation) at one time held a direct or indirect interest in one of the MLS Respondents, but does not at the present time.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vii

MLS RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI 1

COUNTER-STATEMENT OF THE CASE 3

A. The Creation of Major League Soccer 3
B. MLS and Competitive Forces 5
C. Proceedings in the District Court 7
D. The First Circuit Opinion 9

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI 12

1. There Is No Need for This Court to Consider Petitioners' Argument That a Claim for Conspiracy to Monopolize Under Section 2 of the Sherman Act Can Be Sustained Without Proof of Any Relevant Market 12

a. Petitioners Vastly Overstate the Scope and Significance of the First Circuit's Ruling 12

b. Any "Circuit Split" That May Once Have Existed Was Insignificant and Has, in Any Event, Been Resolved by This Court's Decision in *Spectrum Sports* 14

c. Proof of a Relevant Market Is a Necessary Element of a Conspiracy to Monopolize Claim 18

2. Petitioners Cannot Complain That They Were Denied a Jury Trial on Their Claim That MLS's Structure Violates Section 1 of the Sherman Act 24

a. Despite Petitioners' Urging, No "Messages" Need Be Sent to the Courts of Appeals 24

b. Principles of Collateral Estoppel Bar Petitioners from Relitigating the Relevant Market Issue in Connection with Their Section 1 Claim 26

3. Even if the Court Wished to Address the Antitrust Issues Set Forth in the Petition, Federal Labor Policy Would Counsel Against a Grant of Certiorari Here 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Advanced Health-Care Services, Inc. v. Radford Community Hospital, 910 F.2d 139 (4th Cir. 1990) 16

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 22

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 29

Bill Beasley Farms, Inc. v. Hubbard Farms, 695 F.2d 1341 (11th Cir. 1983) 16

Brown v. Pro Football, Inc., 518 U.S. 231 (1996) 3, 28, 29

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 20

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 20

Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) 26, 27

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 20, 22

Doctor's Hosp. of Jefferson, Inc. v. S.E. Med. Alliance, Inc.,
123 F.3d 301 (5th Cir. 1997) 16, 26, 27

Electronics Communications Corp. v.
Toshiba America Consumer Products, Inc.,
129 F.3d 240 (2d Cir. 1997) 15, 18

FTC v. Ind. Fed'n of Dentists,
476 U.S. 447 (1986) 26

Full Draw Productions v. Easton Sports, Inc.,
182 F.3d 745 (10th Cir. 1999) 17, 18

Haddle v. Garrison,
525 U.S. 121 (1998) 22

Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,
627 F.2d 919 (9th Cir. 1980),
cert. denied, 450 U.S. 921 (1981) 17, 18

Intergraph Corp. v. Intel Corp.,
195 F.3d 1346 (Fed. Cir. 1999) 17

Kennedy v. Long Island R.R. Co.,
319 F.2d 366 (2d Cir.),
cert. denied, 375 U.S. 830 (1963) 29

Lessig v. Tidewater Oil Co.,
327 F.2d 459 (9th Cir.),
cert. denied, 377 U.S. 993 (1964) 14, 18

McNeil v. NFL,
790 F. Supp. 871 (D. Minn. 1992) 27

Metro Indus., Inc. v. Sammi Corp.,
82 F.3d 839 (9th Cir.),
cert. denied, 519 U.S. 868 (1996) 27

Monument Builders of Greater Kansas City, Inc. v. America Cemetery Ass'n of Kansas,
891 F.2d 1473 (10th Cir. 1989),
cert. denied, 495 U.S. 930 (1990) 17

Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.,
553 F. Supp. 962 (N.D. Ill. 1982) 27

Salco Corp. v. General Motors Corp.,
517 F.2d 567 (10th Cir. 1975) 18

Salinas v. United States,
522 U.S. 52 (1997) 22

Selectron, Inc. v. AT&T Co.,
587 F. Supp. 856 (D. Or. 1984) 27

Spectrum Sports, Inc. v. McQuillan,
506 U.S. 447 (1993) ..... passim

Times-Picayune Publishing Co. v. United States,
345 U.S. 594 (1953) 23

United States v. Consolidated Laundries Corp.,
291 F.2d 563 (2d Cir. 1961) 15, 18

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 377 (1956) 19

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 27

United States v. United States Gypsum Co.,
438 U.S. 422 (1978) 22

Volvo North America Corp. v.
Men's International Professional Tennis Council,
857 F.2d 55 (2d Cir. 1988) 15, 16

STATUTES

15 U.S.C. § 1 ..... passim

15 U.S.C. § 2 ..... passim

Fed. R. Civ. P. 15(b) 28

Ted Stevens Olympic and Amateur Sports Act,
36 U.S.C. § 220501 4

OTHER AUTHORITIES

2 Julian O. von Kalinowski et al.,
Antitrust Laws and Trade Regulation
§ 26.02[6] (2d ed. 2002) 15

3A Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law ¶ 809 (2d ed. 2002) 21

MLS RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

On a review of the voluminous record of a three-month jury trial and the four years of litigation that preceded it, the First Circuit affirmed the dismissal of Petitioners' claims under Sections 1 and 2 of the Sherman Act. The court did so based on the specific facts and circumstances presented by this case, without establishing any general principles of law or otherwise announcing legal rules of precedential value.

Petitioners, a class of soccer players employed by respondent Major League Soccer, L.L.C. ("MLS"), nonetheless ask this Court to review two aspects of the court of appeals' decision. First, they challenge the affirmance of the trial court's ruling that, in order to prevail on their Section 2 conspiracy to monopolize claim, Petitioners had to prove the relevant market in which the Respondents had allegedly sought to foreclose competition through an exclusive dealing arrangement. (Pet. at 9-19.) The decision of the First Circuit, however, was by its own terms *sui generis*, the court focusing solely on the facts and circumstances of this case and specifically declining to hold that proof of a relevant market is required in all conspiracy to monopolize cases. (35a.)[1] Although Petitioners attempt to establish the existence of a growing divergence of opinion among the circuits on this issue

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[1] Citations in the form "___a" refer to the appendix to the Petition in this Court. Citations in the form "A___" refer to the Joint Appendix filed in the Court of Appeals for the First Circuit.

(Pet. at 15-19), any "circuit split" that may once have existed has been effectively rectified by this Court's ruling in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). Indeed, that decision has engendered a coalescing of opinion among the circuits that relevant market evidence is required for a conspiracy to monopolize claim.

Petitioners also seek review of the First Circuit's affirmance of the dismissal of their Section 1 claim that Major League Soccer, though a single limited liability company, is in reality a group of independent competitors seeking to restrict competition among themselves for player services. Petitioners argue that, because the court of appeals expressed, in *dicta*, some disagreement with the district court's reasoning in rejecting this claim, it should have remanded the case for a new trial. (Pet. at 19-22.) Notably, this claim was decided on cross-motions for summary judgment, the parties assuming the validity of Petitioners' relevant market definition solely for purposes of those motions. (50a.) Thus, the only issue that was not resolved on summary judgment was the alleged relevant market, and that issue has since been the subject of a three-month jury trial. Petitioners' complaint that they were denied a trial by jury on their Section 1 claim is therefore a hollow one, at best.

In any event, the First Circuit held only that, on a review of the particular facts and circumstances of this case, throughout which for tactical reasons Petitioners repeatedly urged the adoption of a single, specific, narrowly crafted relevant market definition, there was every reason to believe

that "if the section 1 claim had not been dismissed on summary judgment it would have been presented at trial with the same market analysis alleged in the complaint." (19a.) On that basis, not on the basis of any holding of general application, the court concluded that the jury's rejection of Petitioners' relevant market theory would have doomed their Section 1 claim as well. That principles of collateral estoppel required this result only confirms that there is no reason for this Court to review the First Circuit's ruling.

Even if the legal issues presented by Petitioners were otherwise worthy of this Court's attention, this would not be an appropriate case in which to address them. At bottom, this is a dispute between an employer and its employees over terms and conditions of employment of professional athletes. As this Court held in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), labor disputes are best resolved through application of the federal labor laws, not through antitrust litigation. Because principles of national antitrust policy should not be determined in the context of a labor dispute, the petition for a writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

A. The Creation of Major League Soccer

Soccer is by far the most popular team spectator sport in the world. Although United States sports fans have historically failed to support professional soccer leagues, hope for professional soccer in this country rose in 1988, when the

international soccer federation awarded the United States the right to host the 1994 World Cup tournament. A condition of that award was that a Division I (*i.e.*, major league) professional soccer league be established in this country. (A6635.) To that end, in December 1993, three organizations interested in operating a Division I soccer league presented business plans to the National Board of Directors of the United States Soccer Federation ("USSF").[2] (A7968-69.) After unanimously confirming its long-standing position (A8361; A7012) that the United States could not support more than one Division I league (A7971; A7012-13), the Board sanctioned MLS by an overwhelming vote, believing that it had the greatest chance of success. (A7971; A7009-10; A7014; A7018.)[3] In 1995, MLS was granted a limited period of exclusivity; after only two seasons of MLS operation, any other applicant was free to seek Division I status from the USSF. (A8440-41.)

In order to cope with the economic realities of modern professional sports and to avoid the chronic problems encountered by its predecessors, MLS was organized so that the league, not the individual teams, has the power to conduct and control all business operations on a centralized basis.

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[2] The USSF has been authorized by the Congressionally sanctioned United States Olympic Committee to be the national governing body for soccer in this country. 36 U.S.C. § 220501. (A7050.)

[3] The only other serious bidder, the Division II American Professional Soccer League, simply did not compare with MLS in terms of its capitalization, track record and potential for success. (A8454; A7628-724; A7500-618; A7009-10; A7014; A8652; A8655.)

Critical to MLS's ultimate success, its founders believed, was the ability to engage in league-wide marketing programs, to coordinate and control all broadcasting contracts, to offer integrated sponsorship packages and licensing deals, to spread revenues and allocate expenses equally among all the teams, to control employee salaries and other costs, and to determine the teams for which each player would play. (A1697; A1649-53.) Thus, unlike other sports leagues, which grew out of localized sports businesses and have long operated as joint ventures or unincorporated associations of individually owned and separately constituted "franchises," MLS is structured like a conventional modern business, a limited liability company that controls all aspects of league operations.[4]

B. MLS and Competitive Forces

MLS's centralized structure has helped it grow and survive. During its existence, average MLS player salaries have increased by nearly 20%. (A8655.) In contrast, the league itself continues to be a highly *un*profitable venture for its investors, who as of 2000 had lost, in the aggregate, over $250 million since the league's inception. (A7240; A8651; A7178.)

MLS confronts the ongoing challenge of gaining a foothold in the vast and highly competitive worldwide market

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[4] Petitioners improperly refer to a "1990 memo" in their factual recitation (Pet. at 3-4) as purported evidence of anticompetitive intent in connection with the formation of MLS. That document, prepared by counsel to analyze one possible "single entity" league structure, was not part of the evidence before the jury at trial.

for soccer player services. Minor leagues, indoor leagues and other leagues and teams throughout the world compete with one another, and with MLS, to attract and sign the best available soccer players. Unlike other major U.S. sports leagues, each of which is the highest-paying league of its kind, MLS consistently loses the best professional soccer players to leagues in other countries where, for most top soccer players, salaries and ancillary earning opportunities are substantially greater than in the United States. (A7169.)

The extensive trial evidence established that MLS competes for player services in an international marketplace, and that MLS players have played professional soccer throughout the world. Nearly 200 MLS players played professional soccer in dozens of foreign countries either before or after they joined MLS. (A6298-302; A7172-74; A8445; A6459.) In each of MLS's first five seasons, nearly 40% of the 200-250 players on MLS team rosters had foreign citizenship. (A7175-76; A6304.) The evidence also demonstrated that the market in which MLS competes for player services extends beyond Division I. MLS players have numerous opportunities in lower division leagues worldwide. (A6298-302; A7172-74; A8445.) Indeed, MLS is regularly outbid for its players by lower division clubs throughout the world. (A7176-77.)

C. Proceedings in the District Court

This litigation was commenced in 1997, shortly after the league's inaugural season. Petitioners[5] alleged that the MLS Respondents had unlawfully conspired to restrain trade in the market for player services in violation of Section 1 of the Sherman Act by structuring the league so that all players are hired centrally by MLS rather than by the individual MLS teams. (A3318-19.)[6] They also contended that the MLS Respondents and the USSF violated Section 2 of the Sherman Act by temporarily establishing MLS as the only Division I league in the United States. (A3321-22.) With respect to both of these counts, Petitioners defined the relevant market for player services in precisely the same way: the market "for the services of major league ('Division I') professional soccer players in the United States." (A3318; A3321.)

The MLS Respondents moved for partial summary judgment, arguing that the league's status as a limited liability company rendered it incapable, as a single actor, of violating Section 1 of the Sherman Act. (A1624-25.) Petitioners cross-moved for partial summary judgment on this issue. (A1601-02.) The district court rejected Petitioners' attempt to

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[5] The plaintiff class consists of "all players who either have been, or are now, or will be under contract to play ('Division I') professional outdoor soccer for [MLS] . . . ." (A3055.)

[6] The First Circuit also affirmed the dismissal of Petitioners' claim that the transactions that formed MLS violated Section 7 of the Clayton Act. (35a-39a.) Petitioners do not challenge that ruling in this Court.

portray MLS and its investors as a conventional, franchise-based sports league and dismissed their Section 1 claim, declaring that "the plaintiffs' deconstruction efforts are unavailing. MLS is what it is. As a single entity, it cannot conspire or combine with its investors in violation of § 1, and its investors do not combine or conspire with each other in pursuing the economic interests of the entity." (61a.)

Shortly after this ruling, a jury trial commenced with respect to Petitioners' Section 2 claim.[7] In the 3½ years of pretrial discovery, the parties had produced over 400,000 pages of documents and conducted 58 depositions. During the trial, the parties called 19 live witnesses, introduced 263 exhibits into evidence, and developed a trial transcript of nearly 7,000 pages. Eight of the eleven weeks of testimony were occupied by Petitioners' submission of evidence, at the conclusion of which the district court presented a 15-question special verdict form to the 11 jurors. (A7490.) After deliberating for a full day, the jury answered the first two

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[7] Just before trial, Petitioners revealed for the first time an intent to introduce evidence relating to the formation and operation of MLS as a single company in connection with their Section 2 claim. (A3924-25.) The MLS Respondents moved *in limine* to preclude the introduction of such evidence as legally irrelevant to that claim and as a circumvention of the dismissal of their Section 1 claim. (A3966-68.) After full briefing and argument, the district court ruled that Section 2 liability could not be based on MLS's formation and operation as a single company. (A3939-44; A3948-49; A4807; A4811-13.) Petitioners' criticism of this ruling (Pet. at 7) ignores the court's simultaneous determination that evidence concerning MLS's unitary status would be permitted as relevant to the jury's overall understanding of the case. (A4806-07.)

questions in the negative, refusing to agree with Petitioners that MLS competes for players in a market both restricted to the United States and limited to Division I player services. (A5706.) With no need for further deliberations, judgment was entered dismissing the Section 2 claim. (40a-43a.)[8]

D. The First Circuit Opinion

In a unanimous opinion (3a-39a), the United States Court of Appeals for the First Circuit affirmed the judgment of the district court. In affirming the dismissal of the Petitioners' Section 2 claim, the court rejected all contentions that the jury verdict was tainted by erroneous trial rulings. The court further concluded that the jury's refusal to accept Petitioners' contention that the relevant market was limited to the services of Division I soccer players in the United States required dismissal of all aspects of their Section 2 claim.

In so doing, the court held that, in the particular circumstances presented by this case, proof of the relevant market alleged by Petitioners was required before liability could be imposed for a conspiracy to monopolize. Observing that "[c]onspiracy to monopolize claims are not often the subject of much attention, since almost any such claim could be proved more easily under section 1's ban on conspiracies in restraint of trade," the court reviewed the pertinent authorities

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[8] At the close of evidence, the district court granted a motion dismissing the Section 2 claims as against each of the MLS investors named as defendants. (A7356.) Petitioners do not challenge this ruling on appeal.

and found "more persuasive" those stating that a relevant market is necessary for such a claim. (32a.) Although noting that "there may in principle be some cases in which one could argue that a conspiracy claim should be provable without a showing that the alleged market is a real economic market," the court held that "[t]his case is not among them." (32a-33a.)

The court reasoned that because the particular agreement challenged in this case, "a garden variety exclusive dealing arrangement limited to three years," was "not inherently unlawful," its legality would have to be:

> judged primarily by considering, in addition to competitive or efficiency justifications, any actual or threatened adverse effects on competition. Predicted effects turn, obviously, on the establishment of a market in which the exclusive dealing arrangement may affect prices or competitors. Absent threatened effects, there is normally no basis for condemning an exclusive dealing arrangement.

(33a (citations omitted).)

The First Circuit also affirmed the district court's judgment dismissing Petitioners' claim that MLS, even though structured as a single limited liability company, was in reality a conspiracy of competing team owners operating in violation of Section 1. The court so ruled based on its conclusion that liability could not be imposed on the MLS Respondents in the

face of the jury's rejection of the Petitioners' relevant market theory. The court did not accept Petitioners' contention that if they had been permitted to go to trial on this claim they might have persuaded the jury to find a different relevant market. As Petitioners had structured their case, the First Circuit ruled, there was "no reason to think that any other market would have been alleged and made the subject of proof if the section 1 claim had gone to trial along with the section 2 claims." (18a.) The court therefore concluded that "any error in dismissing the claim based on a single entity theory was harmless .... The outcome, as the plaintiffs shaped their own case, would have been the same." (19a-20a.)

There being no need for the court to address the applicability of Section 1 to the conduct of the MLS Respondents, the First Circuit acknowledged that its discussion of the "single entity" issue was *obiter dicta*: "we conclude that the single entity problem need not be answered definitively in this case." (16a.)[9]

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[9] Thus, this Court should ignore Petitioners' repeated protestations that the First Circuit "overturned" or "rejected" the district court's analysis of the single entity issue (Pet. at 8, 19).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. There Is No Need for This Court to Consider Petitioners' Argument That a Claim for Conspiracy to Monopolize Under Section 2 of the Sherman Act Can Be Sustained Without Proof of Any Relevant Market.

a. Petitioners Vastly Overstate the Scope and Significance of the First Circuit's Ruling.

Petitioners attempt to portray the decision below as one that declared, for all cases and all purposes, that "proof of a relevant market is an essential element of a conspiracy to monopolize claim" (Pet. at 12). By so doing, they inappropriately seek to inflate the significance of the First Circuit's opinion and its status in antitrust jurisprudence.

Contrary to Petitioners' depiction, the First Circuit did nothing more than conclude that, *in this particular case*, Petitioners were required to prove the relevant market they had alleged. The court accepted the proposition that in some conspiracy to monopolize cases, proof of a relevant market may not be necessary, referring as examples to situations in which "conspirators were aiming at a demonstrably illegal result, say, a world wide monopoly of gold production or a naked horizontal allocation of markets." (34a.) In such cases, the court observed, "the conspiracy should be punished because the demonstrated intent to break the law shows that

the conspirators are dangerous even if this particular venture was impractical." (*Id.*)

Here, however, the First Circuit recognized that the illegality of the challenged arrangement "is far from clear. To ignore the question whether [Division I soccer in the United States] is a relevant market in the economic sense is to assume that the end aimed at is illegal." (*Id.*) The court continued:

> [T]here may be contexts in which the existence *vel non* of a relevant market is beside the point in a conspiracy to monopolize case, but this case is not one of them. The exclusivity agreement sought by MLS might be unlawful if it threatened adverse competitive effects but not otherwise; and this in turn required proof that someone who was the only purchaser of Division I soccer player services in the United States would control prices in an economic market.

(35a.)[10]

Thus, it is apparent from the opinion below that the court viewed this case as *sui generis*, and that it had no intention of announcing a generally applicable principle of

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[10] Indeed, the substance of the First Circuit's opinion is not far removed from the position urged by Petitioners, who concede that "evidence of a relevant market might . . . be useful to a jury in assessing a claim of specific intent to monopolize." (Pet. at 14.)

antitrust law. Simply put, the alleged errors in the First Circuit's decision do not warrant review by this Court.

b. Any "Circuit Split" That May Once Have Existed Was Insignificant and Has, in Any Event, Been Resolved by This Court's Decision in *Spectrum Sports*.

Petitioners argue vigorously that circuits have reached differing conclusions regarding the need to establish a relevant market in a conspiracy to monopolize claim, contending that there is a "pervasive" and "deepening" rift (Pet. at 9, 15) that this Court should resolve. Even if Petitioners were correct that there was a division among the courts of appeals on this issue, this Court's ruling in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), has resolved it.

In *Spectrum Sports*, this Court decided that an attempt to monopolize claim requires proof of a dangerous probability of monopolization of a relevant market. The Ninth Circuit, following its earlier ruling in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), had held that because Section 2 prohibits attempts to monopolize "any part" of commerce, it did not matter what part of commerce was implicated. *See Spectrum Sports*, 506 U.S. at 457. Rejecting that approach, this Court explained that the reference to "any part" in Section 2 did not mean that liability could be imposed without reference to any relevant market, but that it was "immaterial how large an amount of interstate trade is affected, or how important that part of commerce is in relation

to the entire amount of that type of commerce in the Nation." *Id.* at 457 & n.9. Thus, proof of a relevant market was required.

Although *Spectrum Sports* did not specifically involve a claim for conspiracy to monopolize, the reasoning of the decision is equally applicable to that offense. Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, *or combine or conspire* with any other person or persons, to monopolize *any part* of the trade or commerce among the several States . . . ." 15 U.S.C. § 2 (emphasis supplied). Congress applied the requirement that some "part" of interstate commerce be adversely affected to all three components of Section 2 without differentiation. *Spectrum Sports* thus can only be read to require that, like claims of monopolization and attempted monopolization, conspiracy to monopolize claims must be assessed in the context of a relevant market. *See* 2 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 26.02[6], at 26-52 to 26-53 (2d ed. 2002).

Not surprisingly, circuits addressing the issue since *Spectrum Sports* have almost uniformly reached that conclusion. In *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc.*, 129 F.3d 240, 246 (2d Cir. 1997), for example, the Second Circuit expressly relied on *Spectrum Sports* in concluding that a "defendant's power in the relevant market must be established" in a conspiracy to monopolize case. By so doing, the court overruled prior Second Circuit decisions such as *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961), and *Volvo North*

America Corp. v. Men's International Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988), two cases on which Petitioners rely (Pet. at 16-17 n.11). *See also Doctor's Hosp. of Jefferson, Inc. v. S.E. Med. Alliance, Inc.*, 123 F.3d 301, 311 (5th Cir. 1997) ("To establish Section 2 violations premised on attempt and conspiracy to monopolize, a plaintiff must define the relevant market.").[11]

Most of the cases cited by Petitioners (Pet. at 16 n.9) for the proposition that proof of a relevant market is unnecessary were decided before this Court rejected that view in *Spectrum Sports*. In any event, even if these decisions are still good law, they do not help establish the existence of a circuit split. For example, the Fourth Circuit in *Advanced Health-Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139 (4th Cir. 1990), did not address one way or the other whether proof of a relevant market was required, but did list "a specific intent *to achieve an unlawful monopoly*" as a necessary element of a conspiracy to monopolize claim. *Id.* at 150 (emphasis supplied). In measuring the complaint against these elements, the court recited that plaintiff had alleged "a specific intent *to monopolize relevant markets (the [durable medical equipment] markets for the geographic areas surrounding the hospitals)* . . . ." *Id.* (emphasis supplied). The clear implication of this parallelism is that a court can only determine whether the

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[11] Even before *Spectrum Sports*, the Eleventh Circuit had ruled that "relevant market is a necessary element of a conspiracy to monopolize." *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983).

object of a conspiracy is an "unlawful monopoly" in the context of a relevant market.[12]

Similarly, the Tenth Circuit in *Monument Builders of Greater Kansas City, Inc. v. America Cemetery Ass'n of Kansas*, 891 F.2d 1473, 1484 (10th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990), never stated that a charge of conspiracy to monopolize could be analyzed without regard to a relevant market. To the contrary, the court reversed the dismissal of a conspiracy to monopolize claim in part because the plaintiff had alleged an intent to monopolize "the Kansas City market for grave markers." *Id.* Moreover, the Tenth Circuit has since expressly declared, in *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999), that one element of a conspiracy to monopolize claim is the "specific intent on the part of defendants to monopolize the relevant market."

The Ninth Circuit's decision in *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), likewise provides no support for Petitioners' contention. The court never stated that liability could be established without proof of a relevant market, and

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[12] The only court of appeals decision cited by Petitioners that post-dates *Spectrum Sports, Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999) (Pet. at 16 n.9), is to the same effect. There, the Federal Circuit noted that a conspiracy to monopolize claim requires proof of a "specific intent to achieve an unlawful monopoly," and referred specifically to the record evidence regarding the defendants' "market" and to the existence of "many competitors, with no significant entry barriers" in assessing whether there had been an adverse effect on competition. *Id.* at 1363-64.

in fact recognized that a plaintiff claiming a conspiracy must show that the defendants acted with a specific intent to monopolize, thereby necessitating proof of a relevant market.[13]

In short, far from exhibiting a "deepening split," the circuits have never been as divided as Petitioners suggest and, in any event, particularly in the wake of this Court's ruling in *Spectrum Sports*, are in the process of coalescing without this Court's further intervention. Petitioners cannot reverse that trend by presenting a substantively and temporally distorted portrait of selected decisions of the courts of appeals. The petition should be denied on this basis alone.

c. Proof of a Relevant Market Is a Necessary Element of a Conspiracy to Monopolize Claim.

Even assuming that the First Circuit had, in this case, announced that proof of a relevant market is required in all conspiracy to monopolize cases – which, as discussed above, it did not – there is no need for this Court to upset the emerging trend among the circuits to reach a conclusion that

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[13] In any event, the continuing validity of the Ninth Circuit's ruling in *Hunt-Wesson* is in considerable doubt, given that it was predicated chiefly on three now-discredited precedents: (1) the Second Circuit's 1961 decision in *Consolidated Laundries*, the reasoning of which was rejected by that court itself in *Electronics Communications Corp.* (*see supra* pp. 15-16), (2) the Ninth Circuit's 1964 decision in *Lessig*, which this Court overruled in *Spectrum Sports* (*see supra* pp. 14-15), and (3) the Tenth Circuit's ruling in *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975), a case implicitly overruled in *Full Draw*, 182 F.3d at 756.

is thoroughly consistent with fundamental principles of antitrust law and policy.

Petitioners declare, without any citation to authority, that "the only reason for establishing a relevant market in a monopolization case is to prove market power" (Pet. at 11). From this unsupported premise they argue that because market power is not a required element of a conspiracy to monopolize claim, proof of a relevant market is unnecessary. This syllogism is fatally flawed.

While a conspiracy to monopolize claim does not require proof of monopoly power (as does a claim of monopolization), or of a dangerous probability of successfully acquiring such power (as does a claim of attempted monopolization), as noted above such a claim *does* require proof that a defendant acted with a specific intent to monopolize. Allegations that a defendant acted with specific intent cannot be evaluated or proven without first establishing a market context against which to consider them. Simple logic and basic antitrust principles confirm the validity of this proposition. Monopoly power is the power to control prices or exclude competition in the relevant market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956). Thus, a defendant cannot be said to have acted with the specific intent to monopolize where that defendant's intent is not directed toward foreclosing competition in the relevant market.

Moreover, punishing a defendant for possessing a particular intent, when that intent is not directed toward the relevant market, would do nothing to further the goals of the antitrust laws. This Court has repeatedly stated that the antitrust laws are designed to protect competition, not individual competitors. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 n.14 (1984) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Unless a defendant specifically intends to monopolize the relevant market, there is no danger that such specific intent could result in monopoly power, and no danger that competition will be harmed. Where there is no possible harm to competition, antitrust concerns need not and should not be raised.[14] Defining the relevant market is therefore necessary to assess whether a defendant's alleged specific intent could injure competition if it were acted upon.[15]

Additionally, the alleged conspiracy between MLS and the USSF, two entities that are not potential competitors and

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[14] As the district court stated in response to Petitioners' suggestion that any intent, regardless of whether the market contemplated is actually the relevant market, was sufficient to support Section 2 liability under a conspiracy to monopolize claim: "That sounds to me like liability from pipe dreams." (A7383.)

[15] The First Circuit agreed, observing that the "exclusivity agreement sought by MLS might be unlawful if it threatened adverse competitive effects but not otherwise; and this in turn required proof that someone who was the only purchaser of Division I soccer player services in the United States would control prices in an economic market." (35a.)

one of which does not even participate in the relevant market, would clearly be subject to rule of reason scrutiny under Section 1, meaning that Petitioners would be obligated to prove their relevant market in order to demonstrate the potential for anticompetitive effects.[16] There is no logical basis for permitting Petitioners to circumvent this process in connection with their Section 2 claim, which is similarly designed to protect competition and should not be employed where the intent or conduct in question would be incapable of causing anticompetitive effects. As a leading antitrust authority observed:

> To require power under § 1 before condemning a particular agreement is necessarily to say that the arrangement is socially desirable, or at least not harmful, in the absence of power. That policy conclusion cannot sensibly be avoided or negated by the simple trick of calling the agreement a conspiracy to monopolize.

3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 809, at 390-91 (2d ed. 2002).

General principles of conspiracy law confirm this conclusion. The law does not impose liability based on a conspiracy that exists solely in the abstract; conspiracy

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[16] Conversely, where the alleged conduct, if proved, would amount to a *per se* restraint of trade under Section 1, a Section 2 conspiracy to monopolize claim would be unnecessary.

allegations can only be evaluated in the context of the *object* of the conspiracy. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 444 (1978); *see also Haddle v. Garrison*, 525 U.S. 121, 124-25 (1998); *Salinas v. United States*, 522 U.S. 52, 63 (1997). Thus, a conspiracy to monopolize claim cannot succeed without proof of what it was that the alleged conspirators sought to monopolize, *i.e.*, the relevant market.

Petitioners' attempt to wring a contrary holding out of this Court's prior rulings, such as *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (Pet. at 10-11), is unavailing. Although this Court ruled in *American Tobacco* and its progeny that proof of market *power* is not required for a conspiracy to monopolize claim, it did not eliminate the need for proof of the *market* sought to be monopolized. Rather, this Court specifically referred to the market that was the object of the alleged conspiracy, noting that it was "to exclude actual and potential competitors from *the cigarette field.*" *Id.* at 788 (emphasis supplied).

While none of the cases cited in Point I-A of the Petition (at 10-12) support the contention that this Court has in some oblique way already dispensed with the need to prove a relevant market in a conspiracy to monopolize case,[17] the

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[17] Petitioners' citation to *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984) (Pet. at 11) is misleading. Nothing in *Copperweld*, which discussed the applicability of *Section 1* of the Sherman Act to the concerted action of a corporation and its wholly owned subsidiary, suggests that this Court viewed a conspiracy to monopolize under *Section 2* as a more serious offense than actual monopolization.

contrary is suggested in the passage Petitioners themselves quote from *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626-27 (1953) (Pet. at 13), which held that a specific intent to destroy competition under Section 2 cannot be found when an action is "predominantly motivated by legitimate business aims." Because the legitimacy of business aims cannot be assessed outside of the context of a relevant market, the need to prove the existence of such a market is subsumed within the requirement that "specific intent" be shown.

In sum, proof that parties have entered into an agreement to affect competition in an amorphous, undefined way is simply insufficient to support a violation of Section 2. A plaintiff must establish the relevant market, the part of commerce the alleged wrongdoers intended to affect. If Petitioners had their way, they would be entitled to treble damages and injunctive relief under Section 2 regardless of whether MLS and the USSF had agreed to take steps to dominate the worldwide market for automobile manufacturing or to control the market for 5'10" tall professional soccer players living within three blocks of RFK Stadium. This ludicrous result cannot have been intended by Congress in adopting the Sherman Act, or by this Court in interpreting that law.

There being no reason for this Court to review the First Circuit's affirmance of the dismissal of Petitioners' claim of conspiracy to monopolize, the petition should be denied.

2. Petitioners Cannot Complain That They Were Denied a Jury Trial on Their Claim That MLS's Structure Violates Section 1 of the Sherman Act.

a. Despite Petitioners' Urging, No "Messages" Need Be Sent to the Courts of Appeals.

Petitioners ask this Court to review the First Circuit's affirmance of the judgment dismissing their Section 1 claim, in which they contended that MLS, although undisputedly a single limited liability company, was in reality a group of individual competitors capable of engaging in a conspiracy among themselves. Petitioners argue that because the court of appeals – in what can only be characterized as pure *dicta* (*see supra* p.11) – expressed some disagreement with the district court's reasoning on this claim before affirming on other grounds, it should have remanded the case to the district court, perhaps for yet another trial.

Petitioners assert that the court below improperly "speculat[ed] about what type of relevant market [Petitioners] would have presented had a §1 trial been conducted." (Pet. at 20.) They criticize the court for having observed that it had "been given no reason to think that any other market would have been alleged and made the subject of proof if the section 1 claim had gone to trial along with the section 2 claims." (18a.) Because Petitioners failed to persuade the jury that their proposed relevant market definition was correct, the First

Circuit concluded that if the Section 1 claim had been tried, it would have failed as well.

The court based this conclusion on the fact that, throughout this case, Petitioners consistently urged *one, and only one,* relevant market definition. (18a-20a.) Petitioners' pleadings, discovery demands, pre-trial proceedings, expert opinions and trial evidence all revolved around their contention that the relevant market was confined to Division I soccer players in the United States. (A3298-327; A5195-216; A6366.) This was obviously an adverten[illegible] strategic decision. In Petitioners' view, because MLS was the *only* competitor in that alleged market, success on their relevant market theory would ineluctably lead to a holding that MLS was a monopolist. As the district court observed, "the plaintiffs' proposed market definition was the fundament for the rest of the theory of liability." (A5724.)

As with its analysis of Petitioners' Section 2 claim, the court of appeals' ruling on this issue was *sui generis,* highly fact-specific and limited to the circumstances of this case. The court made no broad legal pronouncements that are appropriate for this Court's review. Even if the First Circuit had somehow established an erroneous precedent, there is no principle of Supreme Court jurisprudence that counsels in favor of issuing writs of certiorari and deciding cases solely for the purpose of "sending messages" to the courts of appeals, as Petitioners urge (Pet. at 19). Accordingly, the petition should be denied without further consideration.

b. Principles of Collateral Estoppel Bar Petitioners from Relitigating the Relevant Market Issue in Connection with Their Section 1 Claim.

Basic principles of collateral estoppel also militate against a grant of the petition. Petitioners should not be allowed to circumvent, in prosecuting their Section 1 claim, the jury's categorical rejection of their relevant market theory.

If MLS were subject to Section 1 scrutiny, MLS's centralized decision-making with respect to players – the conduct challenged by Petitioners – would be judged under a full rule of reason standard.[18] Under that standard, a plaintiff must establish the potential for anticompetitive effects. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986). This typically requires proof that the defendant possesses market power in the relevant market. *See Doctor's Hosp. of Jefferson, Inc. v. S.E. Med. Alliance, Inc.*, 123 F.3d 301, 311 n.20 (5th Cir. 1997). Here, of course, the jury found that the market alleged by Petitioners does not exist.[19] Because the relevant

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[18] Petitioners no longer contend that the activities of the MLS Respondents should be declared *per se* illegal.

[19] Petitioners are wrong in suggesting (Pet. at 20-21) that a "quick look" analysis would apply, and that they would not have needed to prove market power – or the relevant market – in this case. A "quick look" is justified only in those rare cases where proof of market power would be superfluous because "the great likelihood of anticompetitive effects can be easily ascertained." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *see Ind. Fed'n*, 476 U.S. at 460-61. MLS is a new and small entrant in the vast international market for soccer player services and in the crowded

market inquiry is the same for both Section 1 and Section 2, *see United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966); *Doctor's Hosp.*, 123 F.3d at 310-12; *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 842, 848-49 (9th Cir.), *cert. denied*, 519 U.S. 868 (1996), – indeed, the complaint defined the market identically for both claims (A3318-23) – Petitioners' failure to establish their alleged relevant market at trial on the Section 2 claim should preclude them, as a matter of law, from relitigating the issue.[20]

In sum, proof of relevant market undisputedly being an essential element of Petitioners' Section 1 claim, the dismissal of that claim should have been affirmed in any event based on Petitioners' failure to prove the relevant market on their Section 2 claim.[21]

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professional sports industry. Because it is unable to negotiate for players from a position of strength, Petitioners could not prove that MLS possesses sufficient market power to cause anticompetitive effects. Where, as here, the conduct at issue has plausible competitive justifications, a court cannot – without a *close* look – shift the burden to the defendant to come forward with "hard evidence" of procompetitive effects. *Cal. Dental*, 526 U.S. at 771, 776.

[20] *See, e.g. McNeil v. NFL*, 790 F. Supp. 871, 892-93 (D. Minn. 1992); *Selectron, Inc. v. AT&T Co.*, 587 F. Supp. 856, 859-60, 862 (D. Or. 1984); *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 553 F. Supp. 962, 970 (N.D. Ill. 1982).

[21] Even if there were any merit to Petitioners' suggestion (Pet. at 21) that, had summary judgment not been granted, they might have been permitted to amend their complaint before trial on their Section 1 claim, or that at trial their complaint would have been deemed amended to conform to whatever relevant market the evidence might have supported, that

3. Even if the Court Wished to Address the Antitrust Issues Set Forth in the Petition, Federal Labor Policy Would Counsel Against a Grant of Certiorari Here.

There is an additional, prudential reason for this Court to deny the petition. This is not the proper context in which to resolve any issues of nationwide antitrust law and policy. In fact, this is not an antitrust suit at all. It was brought by a group of employees – professional athletes – who were dissatisfied with the terms and conditions of their employment. Rather than following the procedures required by the federal labor laws for the resolution of such issues, Petitioners chose to file an antitrust suit, claiming that certain of their employment terms violate the federal antitrust laws.

In *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236, 242 (1996), however, this Court made clear that "judicial use of antitrust law to resolve labor disputes" is inappropriate, and confirmed that "[t]he [federal] labor laws give the [NLRB], not antitrust courts, primary responsibility for policing the

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argument thoroughly misses the point. What the First Circuit found dispositive was that, throughout this entire case, including not only the three-month trial on Petitioners' Section 2 claim, but also the *three years preceding summary judgment on their Section 1 claim*, Petitioners had never urged any relevant market definition other than that eventually rejected by the jury. Further, Petitioners cannot escape the jury verdict's preclusive effect on their Section 1 claim as pled (17a-18a) by attempting to conjecture about other, as yet undelineated market definitions they might pursue at a subsequent trial; such a reading of Federal Rule of Civil Procedure 15(b) would effectively eviscerate the doctrine of collateral estoppel.

collective-bargaining process." This precept is consistent with a long line of federal cases holding that the Sherman Act was never intended to apply to disputes over terms and conditions of employment. The principal concern of the Sherman Act has always been to ensure competition in the marketing of goods and services, not to regulate the collective bargaining process or the terms of employment for which workers and employers should collectively bargain. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 372-73 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

Whether the holding of *Brown* and the labor exemption applies to this case is not an issue before this Court. Nevertheless, the essential teaching of *Brown* is that federal labor policy requires that labor disputes be resolved under the procedures and protections established by the labor laws, not in an antitrust courtroom. Accordingly, the MLS Respondents respectfully submit that this labor dispute does not provide the appropriate setting for resolution of issues of antitrust law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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